Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

MONICA STROIK

Petitioner,

v.

WILBUR PONSETI

Respondent.

On Appeal In The United States Court Of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

I.

Generally, in an action under 42 USC 1983, whether the Fifth Circuit Court of Appeals misapplied Graham v. Connor, 109 S.Ct. 1865 (1989) in a situation in which a police officer shot a criminal suspect who was posing no threat to him and who was later found to be an innocent hostage.

II.

Is the issue of whether a police shooting was intentional or accidental a threshold issue which must first be addressed before an application of Graham v. Connor can be considered?

III.

Under circumstances in which an issue in dispute is whether the police officer intentionally or accidentally shot the criminal suspect, whether the "objectively reasonable" standard of Graham v. Connor prohibits the consideration of evidence of a "subjective" or "state of mind" type to prove that the shooting of the criminal suspect, who was actually an innocent hostage, was intentional, and not accidental as the officer claimed.

IV.

How should Graham v. Connor be applied if a police officer intentionally shoots multiple criminal suspects when the shooting of only one of them is (arguably) "objectively reasonable?"

V.

Generally, whether the Fifth Circuit arbitrarily ignored or disregarded evidence which supported the jury's verdict in favor of Petitioner and required Petitioner to prove that a gun was pointed at Ponseti.

LIST OF PARTIES

Monica Stroik

Wilbur Ponseti

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REFERENCE TO THE REPORTS OF OPINIONS

The opinion of the United States Court of Appeals for the Fifth Circuit was reported as Stroik v. Ponseti, 35 F.3rd 155 (USCA 5th Cir. 1994).

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GROUNDS FOR JURISDICTION

(i) The opinion of the United States Court of Appeals for the Fifth Circuit was filed on September 28, 1994.

(ii) The denial of Petitioner's Petition for Rehearing by the United States Court of Appeals for the Fifth Circuit was filed on October 27, 1994.

(iii) The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 USC 1254(1).

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CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

42 USC 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights,privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

———— ♦ ————

STATEMENT OF THE CASE

This action was initially brought in United States District Court for the Eastern District of Louisiana, under 42 USC 1983, by Monica Stroik against Wilbur Ponseti, an officer of the New Orleans Police Department, arising out of an incident which occurred on October 27, 1989, in which Ponseti shot and seriously injured Stroik. On May 8, 1992, the jury award in favor of Monica Stroik and against Wilbur Ponseti was entered into Judgment. Ponseti brought an appeal before the United States Court of Appeals for the Fifth Circuit and on September 28, 1994, the Fifth Circuit reversed the Judgment. (Actually, the Fifth Circuit reversed the trial court's denial of Ponseti's motion for judgment as a matter of law.) A Petition for Rehearing filed on behalf of Stroik was denied on October 27, 1994.

On October 27, 1989, Monica Stroik, who was twenty-two years old, was, along with her brother, robbed and abducted by an armed robber and his accomplice on a New Orleans French Quarter street. They were forced into a van that was being used by Stroik's brother and made to accompany the two robbers who drove around the uptown area of New Orleans committing at least two other armed robberies of pedestrians.

The robberies were reported by police radio to New Orleans policemen in the area, including Wilbur Ponseti. The report indicated that at least one of the robbers was

armed. The van was spotted and several New Orleans policemen in police cruisers, including Ponseti, gave chase.

The armed robber, who was driving the van, lost control of it while making a turn, crashing the van into a curb. Two police vehicles pulled up immediately thereafter. As the police pulled up the robber's accomplice exited the van and ran. Ponseti's partner gave chase on foot after the accomplice.

Ponseti drew his weapon and rushed to the open side door of the van. At the same time the robber grabbed Monica Stroik and began pushing her out of the van. Ponseti, who was only about four feet away from Monica Stroik and to her right, shot her once with his automatic pistol as she was being pushed out of the van. Ms. Stroik was shot in her right side, the bullet taking a slightly downward path.

As Ms. Stroik fell away Ponseti re-aimed his weapon at the robber who was not even out of the van, and fired his weapon numerous times at him in rapid succession, striking him in the right side of the head killing him.

Ponseti then pointed his weapon again at Ms. Stroik and handcuffed her. Until she subsequently told him she had been kidnapped, Ponseti believed she was one of the robbers.

Immediately after the shooting Ponseti gave a statement to a police officer investigating the shooting that the robber and Ms. Stroik had slid out of the side door of the van onto their backs, with Ms. Stroik partially on top of the robber. Ponseti said that after they had fallen out of the van and were lying on the ground, the robber then pointed a gun at Ponseti's face and it was only then that Ponseti began firing at the robber. Ponseti said that he was not aiming at Ms. Stroik and must have accidentally shot her. In effect, he said that both the robber and Ms. Stroik were on the ground before he began shooting.

After this litigation was commenced Wilbur Ponseti gave sworn deposition testimony consistent with his previous statement. However, at trial one of Ponseti's witnesses refuted that version, testifying that Ms. Stroik was not even fully out of the van when Ponseti fired. Therefore, the robber, who was behind Ms. Stroik, was still inside the van and not on the ground and it is less likely that Ponseti would have perceived a gun pointed at him as he was shooting at Ms. Stroik at that moment. Ponseti then repudiated his prior statement and his sworn deposition. He changed his version to deny that the robber and Ms. Stroik were on the ground when he began firing toward them, and ultimately he testified that he could not recall the events of the shooting except that a gun was pointed at him by the robber before he started shooting. It was undisputed that Ponseti issued no verbal warning of any sort before firing his weapon.

While the slain robber was armed with a pistol he did not fire a shot. The robber was shot in the right temple at a slightly upward angle. As indicated, Ms. Stroik was shot in the right side. If Ponseti's original description of the shooting was correct, had Ms. Stroik and the robber fallen from the van before the shooting started, Ponseti would have been firing in their direction from their left.

Other evidence introduced at trial included the fact that a pre-employment psychological evaluation showed that Ponseti had problems with "impulse control." Ms. Stroik's brother testified that immediately after the shooting, before ascertaining that the Stroiks had been kidnapped, Ponseti appeared "enraged."

During the trial Ponseti's testimony was impeached repeatedly by his previous statement and sworn deposition on the circumstances of the shooting. He admitted repeatedly that his trial testimony was not the same as his previous statement and his sworn deposition. He said that at all material times he thought Ms. Stroik was one of the robbers but admitted that at no time did Ms. Stroik pose any immediate threat of harm to him.

Petitioner argued that Ponseti, who was shown to have been enraged and to have a problem with impulse control, rushed the van quickly to shoot the occupants immediately as they exited the van, and before the occupants

would have had time to pose an immediate threat. Other evidence, such as the angles of the bullets, also supported this version. Additionally, Ponseti's testimony was so badly discredited at trial the jury was entitled to disbelieve his changing version of how the shooting occurred and whether a gun was pointed at him.

However, applying Graham v. Connor, 109 S.Ct. 1865 (1989) to the defense's discredited version of the shooting, the Fifth Circuit reversed the jury's verdict.

ARGUMENT

Succinctly stated, based upon the evidence presented at trial, including the impeachment of Wilbur Ponseti's testimony, the jury, in order to render a verdict in favor of Monica Stroik, must have concluded that Ponseti rushed the van and intentionally shot Monica Stroik immediately as she exited the van, even though she posed no immediate threat of harm to him. The jury was entitled to conclude that Ponseti, who had a problem with impulse control, overreacted because of his anger. They were also entitled to conclude that Ponseti lied; that he fabricated a version of the shooting to make it appear justified and that he later had to change that version when it was not corroborated by the emerging facts. They were also entitled to believe that when Ponseti began firing that he would not have had time to perceive whether a gun was pointed at him.

Graham, analysis:

In a typical Graham situation, a policeman uses force against a criminal suspect while in the course of apprehending him. (Whether the officer intentionally used force against the suspect is usually not at issue.) Under Graham a detailed analysis of the circumstances surrounding the use of force is made to determine if there was an "objectively reasonable" basis for the use of force, using those factors set forth in Graham.

Where this case differs from the typical Graham situation, and what apparently escaped the attention of the Fifth Circuit, is that the central issues were whether Ponseti intentionally shot Ms. Stroik and then lied about it. As will be addressed elsewhere herein a different type of analysis was in order.

A perusal of the Fifth Circuit opinion, Appendix A, clearly demonstrates that it missed the central issues. The opinion shows that the court, without regard to the evidence, assumed that a defense version of the shooting was how it occurred. To that version the court applied the "objectively reasonable" test of Graham and exculpated Ponseti.

The Petitioner concedes that if, in fact, Ponseti was legitimately attempting to apprehend (as opposed to executing) the robber and that the robber suddenly pointed a pistol in Ponseti's face, that shooting the robber would

have been objectively reasonable. However, that scenario is not what was demonstrated by the evidence and, furthermore, that analysis only addresses the shooting of the robber, not that of Ms. Stroik.

The Fifth Circuit, knowing that Ms. Stroik was an innocent hostage, apparently forgot that to Ponseti Ms. Stroik was a criminal suspect that he was attempting to apprehend. Therefore, a separate analysis of her behavior vis-a-vis Ponseti was in order, or at least a consideration of her actions in the total incident, to determine if shooting Ms. Stroik was "objectively reasonable."

But let us backtrack for a moment. Before we apply Graham shouldn't we first determine whether Ponseti intentionally shot Ms. Stroik, or accidentally shot her as he aimed at the robber? This is where the Fifth Circuit was wrong. It failed to even address the issue of whether the shooting of Ms. Stroik was intentional and, in fact, in the face of contrary evidence, the court apparently assumed the shooting of Ms. Stroik was merely incidental to the shooting of the robber.

What evidence tended to show that Ponseti intentionally shot Monica? Admittedly the evidence is primarily circumstantial. But, what other kind of evidence could one expect? Certainly one could not expect Ponseti to admit that he intentionally shot someone who posed no threat

to him. The evidence taken collectively, and particularly in light of Ponseti's apparent dishonesty about how the shooting transpired, points a compelling picture of an intentional shooting.

The unrefuted evidence was that Monica Stroik was shot first. In fact she was shot immediately as she was being pushed out of the side door of the van. The robber, although he was holding Ms. Stroik in some fashion, was behind Ms. Stroik and still inside the van. Ms. Stroik, who is rather short in stature, was struck by the bullet in the lower right side of her abdomen. Ponseti, according to his own testimony, was only about four feet away and to the right of anyone exiting the van. Also, Ponseti, by his own testimony, was an expert marksman. What reasonable inferences did the jury draw from this evidence?

Well, first, we know that Ponseti lied in his original statement and in his sworn deposition when he testified that Ms. Stroik and the robber had fallen to the ground before he began firing. Ponseti's own testimony was that as he fired at the suspects on the ground he was moving to his right which would have placed him to the left side of each suspect as he described their positions on the ground. However, not only was Ms. Stroik shot on the right side, the fatal bullet to the robber was on the right side of his head. Furthermore, the angles of the wounds were more consistent with Ponseti shooting the suspects while they were both

upright. Therefore, the wounds were entirely inconsistent with Ponseti's first sworn version of the shooting. However, Ponseti's first version creates the impression of a longer passage of time and suggests a more reasonable course of action by Ponseti.

On the other hand the fact that Ponseti actually shot Ms. Stroik immediately as she emerged from the van is more suggestive of an intentional shooting. Ponseti was an admitted marksman, standing only four feet away, which alone is highly suggestive that he struck what he was aiming at. Additionally, the fact that he rushed the van, which was shown by expert testimony to violate accepted police procedure, and began firing so quickly is more consistent with an intent to end the action by executing the suspects as they emerged from the van.

Also keep in mind that the robber was behind Ms. Stroik as she was pushed from the van. Particularly because Ponseti was standing to the side of the van door the shooting angle to Ms. Stroik's abdomen was completely different from the shooting angle to the robber (who was still inside the van). In fact the shooting angle may have been different by three or four feet. Now keep in mind again that Ponseti was an expert marksman standing only four feet away from Ms. Stroik. Would an expert marksman, who is trained to fire his weapon under quickly developing situations, have missed his target only four feet away by as much as three or

four feet? The jury had ample evidence from which to conclude that Ponseti aimed his first shot directly at Ms. Stroik's stomach.

Now, consider that if Ponseti aimed and shot at Ms. Stroik first, and if the angle of fire to the robber was different, it would have been necessary for Ponseti to then re-aim ("reacquire sight line") at the robber. The unrefuted testimony at trial was that there was a first shot, then a pause, then a quick, rapid succession of several shots. This sequence of shots is entirely consistent with Ponseti first aiming and shooting at Ms. Stroik before shooting the robber.

Also consider that Ponseti issued no verbal warning whatsoever. The evidence showed that he had an opportunity to establish cover behind the van and to issue a warning. The fact that he rushed the van, issued no warning, and fired so quickly is disturbingly consistent with an intentional shooting of Ms. Stroik.

The Fifth Circuit took a very narrow and literal interpretation of Graham and would not consider evidence "focusing on Ponseti's subjective state of mind," (see Appendix A, footnote 6) following the Supreme Court's instruction in Graham that the objective reasonableness of a police officer's use of force be determined "without regard to their underlying intent or motivation." It is suggested that

the Fifth Circuit has taken the Graham guidelines too literally.

Certainly, the Supreme Court could not have intended to exclude "subjective" evidence of "intent or motivation" in addressing the threshold issue of whether a shooting was intentional or accidental. Evidence that the Fifth Circuit specifically disregarded (again, see Appendix A, footnote 6) included Ponseti's pre-employment psychological evaluation showing "poor impulse control" and that he was "enraged." The Supreme Court should clarity Graham so that the threshold issue of whether a shooting was intentional or accidental can first be addressed without the constraints of Graham.

This case poses an interesting question regarding the application of Graham in cases involving the shooting of multiple criminal suspects. To prohibit an in-depth inquiry as to the intended targets of the officer's lethal force may tempt the officer to admit to the intentional shooting in which objective reasonableness can be established and to merely claim that the remaining suspects were struck accidentally. Certainly, the Supreme Court could not have intended this result in restricting the Graham analysis.

How would the Fifth Circuit's decision been different had it first determined that Ponseti intentionally shot Ms. Stroik? Citing Tennessee v. Garner, 105 S.Ct. 1694 (1985),

the Fifth Circuit said particular attention must be paid to "whether the suspect posed an immediate threat to the safety of the officers or others, and whether he was actively resisting arrest." In this case the evidence showed that when Ponseti shot her, Ms. Stroik was being pushed out of the van by a male suspect. There was no element of Ms. Stroik actively resisting arrest and she was unarmed. More importantly, Ponseti admitted at trial that Ms. Stroik, at the time of the shooting, posed no immediate threat to him. That admission alone should negate any argument that Ponseti's intentional use of lethal force against Ms. Stroik was "objectively reasonable."

Evidence and Proof:

The Fifth Circuit opinion (Appendix A, at page 9) says:

> "Finally, the crucial fact in this case is that at the time Ponseti came around the rear of the van, he testified, and there is no evidence contradicting his testimony, that Johnson was pointing a gun at him."

Once again, Ms. Stroik did not point a gun at Ponseti, or did she do anything whatsoever to justify the use of lethal force against her. It is suggested that it was Ponseti who was obligated to prove that a gun was pointed at him (if that is sufficient to exculpate him from shooting Ms. Stroik). Alleging that a gun was pointed at him is tantamount to the qualified immunity defense, and it is the

defendant who bears the burden of proving it. Dennis v. Sparks, 101 S.Ct. 183 (1980).

At trial Ponseti introduced no credible evidence to prove that he saw the robber pointing a gun at him before he began shooting. As previously indicated, Ponseti's testimony was so badly and embarrassingly impeached that it is unlikely the jury believed anything he said. Likewise, the alleged corroborative testimony of Ponseti's fellow officer, Daryl Ribet, established more than anything else that Ribet was not in a position to have seen what happened when Ponseti began firing. The jury, having had the opportunity to observe the demeanor of the witnesses, was entitled to give no weight, as the jury obviously did, to the testimony regarding the robber's gun. However, the Fifth Circuit opinion completely disregards the fact that Ponseti's evidence was not credible, and seems to suggest that Ms. Stroik failed to disprove that a gun was pointed at Ponseti.

The Fifth Circuit further demonstrated its complete failure to grasp the evidence as it three times in the opinion makes reference to Ponseti coming from around the rear of the van when the robber allegedly pointed his gun at him. This conjures up an image of Ponseti being surprised by the robber's gun as he made the turn from around the van.

The Fifth Circuit was apparently unaware that Ponseti changed his testimony about that as well.

Ultimately, Ponseti admitted he did not come from behind the van and Ribet also testified that Ponseti did not come from behind the van. (For Ponseti to have admitted coming from behind the van would have required him to admit that he passed up an opportunity to establish "cover" from which he could have issued a verbal warning and attempted to control the suspects.) The point is that the Fifth Circuit obviously misunderstood the evidence.

Similarly, the Fifth Circuit completely disregarded the fact that Ponseti gave two different versions of the shooting while under oath. He waffled, wavered and actually changed his testimony on items large and small. Yet, incredibly, the only reference that the Fifth Circuit made was a passing remark in a footnote (see Appendix A, footnote 5) that:

> "The parties dispute whether Stroik and Johnson were standing or were on the ground as Ponseti rounded the back of the van..." (Please note again that the court incorrectly has Ponseti coming from behind the van once again.)

It is improper and sets a dangerous precedent for the Fifth Circuit to substitute its judgment for that of the jury in this matter. The jury heard the testimony, had the opportunity to observe the demeanor of the witnesses and to use its own common sense and good judgment. The

conclusion that the jury obviously reached was that Ponseti overreacted, shot Monica Stroik without good reason and then fabricated a version of the shooting, later repudiated him from guilt. In order for the Fifth Circuit to reverse the judgment it was necessary to entirely repudiate the jury's findings and ignore the body of evidence from which the jury drew its conclusion. This was improper. See Sartor v. Arkansas Natural Gas Corporation, 64 S.Ct. 724 (1944) and Tennant v. Peoria & P.U. Ry. Co., 64 S.Ct. 409 (1944).

CONCLUSION

This case presents a unique set of circumstances for the application of the Fourth Amendment "objective reasonableness" test of Graham v. Connor. However, there is a threshold issue, that is whether the shooting of Ms. Stroik was intentional or mere incidental to the shooting of the robber.

The Fifth Circuit's analysis was defective in failing to first determine whether the shooting of Ms. Stroik was intentional. The Supreme Court should clarify how such a situation should be approached and, more particularly, indicate whether Graham prohibits a full and detailed inquiry into that threshold issue.

Furthermore, the Fifth Circuit ignored and disregarded so much evidence in reversing the judgment,

and departed from the accepted and usual course of judicial proceedings, that the exercise of this Court's power of supervision is in order.

For the reasons set forth herein the Supreme Court of the United States should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-3591

MONICA STROIK

Plaintiff-Appellee,

versus

WILBUR PONSETI and WARREN G. WOODFORK

Defendants,

WILBUR PONSETI

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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Before GARWOOD and BARKSDALE, Circuit Judges and SHAW,* District Judge.

GARWOOD, Circuit Judge:

Defendant-appellant Wilbur Ponseti (Ponseti) appeals the trial court's denial of his motion for judgment as a

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* Chief Judge of the Western District of Louisiana, sitting by designation.

matter of law in this suit under 42 U.S.C. § 1983 alleging Ponseti's excessive use of force. Because we find that Ponseti's use of deadly force was objectively reasonable, we conclude that the trial court erred in denying Ponseti's motion. Accordingly, we reverse.

Facts and Proceedings Below

On the evening of October 27, 1989, Ponseti, a police officer with the New Orleans, Louisiana, Police Department, was on patrol in a police car in the second district of the City of New Orleans with his partner, Officer Kevin Balancier (Balancier). At or around 10:30 p.m., the officers heard a police radio broadcast concerning a series of armed robberies that had just occurred in their patrol area. The radio message indicated that four persons were suspected of committing the robberies, that the suspects were driving a blue van, and that two of the suspects were black and two were white. The broadcast further indicated that the suspects were armed.

Upon hearing another radio message that the van had been spotted on St. Charles Street, the officers attempted to intercept the suspects. When they arrived at St. Charles, Ponseti and Balancier observed two police cars following a blue van at high speed. The officers joined in pursuit. The chase continued for several blocks until the van struck a pedestrian. The driver then turned into oncoming traffic, proceeded up the street, and attempted a left turn, but instead lost control of the vehicle and ran into a curb.

As the van came to a stop, a black male opened the sliding, passenger-side door and fled on foot. Balancier parked the police car in the middle of the intersection and, running past the open sliding door of the van, chased the suspect down the street. At the same time that Balancier ran past the van, Ponseti was running toward the van. As Ponseti came around the back of the van to its passenger side, he observed a second black male and a white female exiting the van through the sliding door. The black male was behind the white female with his left hand around her waist and was holding a handgun in his right hand. Ponseti immediately fired his gun seven to nine times, killing the black male and wounding the white female.[1]

The decedent was later identified as Paul Johnson. The injured female was Monica Stroik. She and her brother, Christopher Stroik, had been carjacked by the two black males and then taken as hostages by Johnson and the other man as they committed three armed robberies of pedestrians.

When Ponseti attempted to handcuff Monica Stroik, she responded that she was innocent and that she was wounded. It was only then that the officers learned that the Stroiks had been carjacked and taken as hostages by the two men.

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[1] The woman was struck once in the right side of her abdomen.

On October 17, 1990, Monica Stroik filed suit pursuant to 42 U.S.C. § 1983 against Ponseti and Warren Woodfork, the Superintendent of the New Orleans Police Department. In accordance with 28 U.S.C. § 636(c), the parties consented to proceed before the magistrate judge assigned to the case. On May 4, 1992, the case was tried before a six-person jury. Both Ponseti and Woodfork moved for judgment as a matter of law; the court granted the motion for Woodfork but denied Ponseti's motion. On May 7, 1992, the jury returned a verdict against Ponseti, awarding Stroik $600,000 in actual damages, and finding that Stroik was not entitled to punitive damages against Ponseti. On May 8, 1992, the magistrate judge entered judgment on the verdict for Stroik and against Ponseti.

Ponseti then timely filed a motion for judgment as a matter of law or, in the alternative, a new trial. Ponseti's motion was based on his assertion that his conduct was objectively reasonable under the circumstances and, thus, as a matter of law, not an excessive use of force. The magistrate judge denied Ponseti's motion. Ponseti now brings this appeal.

Discussion

In an appeal from the denial of a judgment as a matter of law, our review of the district court proceedings is limited.[2] See, Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (en banc). To reverse the denial of a judgment as a matter of law, "the facts and inferences [must] point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict." Id. We review the record as a whole, not just the evidence favorable to the verdict, but in the light and with all reasonable inferences most favorable to the verdict. Id. A mere scintilla of evidence does not suffice to create a fact issue, rather there must be a conflict in substantial evidence. Id. at 374-75. It is for the jury to weigh conflicting reasonable inferences and determine the credibility of witnesses. Id. at 375. But a verdict may not rest on speculation and conjecture. Nichols Const. Corp. v. Cessna Aircraft Co., 808 F.2d 340, 346 (5th Cir. 1985). However, if reasonable persons could disagree as to the verdict, a judgment as a matter of law is inappropriate, and we must affirm. Boeing Co. at 374.

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[2] Under the current Federal Rule of Civil Procedure 50, the terms "directed verdict" and "judgment notwithstanding the verdict" have been replaced by the single term "judgment as a matter of law."

The issue in this appeal is whether the magistrate judge erred in concluding that there was a jury question as to whether Ponseti's shooting constituted excessive force.

A deadly force complaint under section 1983 is a federal constitutional claim, and is analyzed according to Fourth Amendment standards. See, Reese v. Anderson, 926 F.2d 494, 500 (5th Cir. 1991). "[A]ll claims that law enforcement officers have used excessive force--deadly or not--in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." Graham v. Connor, 109 S.Ct. 1865, 1871 (1989) (emphasis in original). In applying Graham, this Court has used a three-part test for section 1983 excessive force claims, requiring a plaintiff to show "(1) a significant injury,[3] which (2) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was (3) objectively unreasonable." Reese, 926 F.2d at 500

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[3] But see Harper v. Harris County, 21 F.3d 597, 600 (5th Cir. 1994) (holding that the significant injury requirement of Johnson v. Morel, 876 F.2d 477 (5th Cir. 1989), a case involving a Fourth Amendment violation, is no longer valid in the wake of Hudson v. McMillian, 112 S.Ct. 995 (1992), in which the Supreme court held that a showing of a significant injury was not required to prove an Eighth Amendment violation).

(citing Johnson v. Morel, 876 F.2d 477, 480 (5th Cir. 1989) (en banc) (per curiam)). The burden of proof on each of these elements is, of course, on the plaintiff.

In the case sub judice, there is no dispute that Stroik suffered a significant injury which resulted from Ponseti's use of force. Thus, the only question is whether Ponseti's use of force was "'objectively reasonable' in light of the facts and circumstances confronting [him], without regard to [his] underlying intent or motivation." Graham, 109 s.Ct. at 1872 (citing Scott v. United States, 98 S.Ct. 1717, 1723-1724 (1978), and Terry v. Ohio, 88 S.Ct. 1868, 1879 (1968)). In answering this question, we look at the totality of the circumstances, paying particular attention to "whether the suspect pose[d] an immediate threat to the safety of the officers or others, and whether he [was] actively resisting arrest." Id. (citing Tennessee v. Garner, 105 S.Ct. 1694, 1699-1700 (1985)).

When a suspect is fleeing and an officer has "probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." Garner, 105 S.Ct. at 1701. Indeed, "if the suspect threatens the officer with a weapon . . . deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." Id. Moreover, "[t]he calculus of reasonableness must embody allowance for

the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation." Graham, 109 S.Ct. at 1872.

Although "'[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,'" id. at 1871 (quoting Bell v. Wolfish, 99 S.Ct. 1861, 1884 (1979)), our application of the Graham standard to the facts in Reese v. Anderson, 926 F.2d 494 (5th Cir. 1991), is instructive as to its parameters in this Circuit. In Reese, we held that a police officer was entitled to summary judgment in a section 1983 action where the officer shot and killed a robbery suspect. Responding to a radio call for the robbery of a convenience store, the police officer in Reese spotted the suspects' car and began to give chase. During the chase, which reached speeds of forty to sixty miles per hour, the suspects threw out of the car window what appeared to be parts of a cash register. The suspects' car eventually spun out of control and the police car pulled up along the passenger's side. Kneeling behind his open car door, the police officer instructed the suspects to raise their hands. After initially complying, the suspect in the front passenger seat reached down below the

seat with his left hand. The officer again commanded the suspects to raise their hands and again the suspect in the passenger seat raised and then lowered his hand. After this happened several times, the officer, fearing for his safety, shot the suspect once in the head, killing him. The officer later found that the suspect was, in fact, unarmed. Id. at 500.

In analyzing the district court's denial of the police officer's motion for summary judgment in Reese, we concluded that "[u]nder these circumstances, a reasonable officer cold well fear for his safety and that of others nearby. He could reasonably believe that [the suspect] had retrieved a gun and was about to shoot." Id. at 501. For this reason, we held that the "officer [was] justified in using deadly force to defend himself and others around him," id., and that the officer was entitled to summary judgment as a matter of law.

In Smith v. Freeland, 954 F.2d 343, 347 (6th Cir. 1992), the Sixth Circuit followed our decision in Reese in analogous circumstances, also aptly pointing our:

> ". . . we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace

> the dangerous and complex world that policemen face very day. What constitutes "reasonable" action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure."[4]

In the case sub judice, the essential facts are not in dispute. When Ponseti and Balancier arrived at the scene of the shooting, all of the information they possessed indicated that there were both black and white suspects in the van, that they were armed, and that they had all been involved in the robberies of pedestrians. The van had just come to an abrupt stop after a high speed chase during which the van had struck a pedestrian. One suspect had begun to flee on foot and two others were exiting the van. Finally, the crucial fact in this case is that at the time Ponseti came around the rear of the van, he testified, and there is no evidence contradicting this testimony, that Johnson was

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[4] Smith also observes:

> "Furthermore, the fact that Officer Schulcz's actions may have violated Springdale's policies regarding police use of force does not require a different result. Under § 1983, the issue is whether Officer Schulcz violated the Constitution, without being subjected to increased liability under § 1983." Id.

Again, we agree.

pointing a gun at him.[5] Hence, unlike the officer in Reese, Ponseti's life was actually in jeopardy when he shot. Given these facts, Ponseti had "probable cause to believe that the suspect[s] pose[d] a threat of serious physical harm," Garner, 105 S.Ct. at 1701, to Ponseti, or to others if the suspects were allowed to flee. Because Ponseti could have reasonably believed that the suspects posed an imminent, deadly threat, we conclude that he was justified in using deadly force.[6]

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[5] The parties dispute whether Stroik and Johnson were standing or were on the ground as Ponseti rounded the back of the van; however, all direct evidence indicates that, whether standing or on the ground, Johnson was pointing a gun at Ponseti. There is no evidence from which a jury could conclude otherwise.

[6] Stroik contends that several factors militate against a finding that Ponseti's use of force was not excessive. Ultimately, Stroik's argument boils down to an assertion that the evidence supported a jury finding that "Ponseti was not in full control of his anger and that he impulsively abandoned his police training and shot the robbers, believing that Monica Stroik was also a robber." Appellee's Brief at 10. In support of her argument, she notes that Christopher Stroik testified that Ponseti seemed "enraged" after the shooting and that a pre-employment psychological profile indicated that Ponseti had "poor impulse control." Regardless of the merits of these claims, Stroik's argument fails because its focus is on Ponseti's subjective state of mind. In so doing, Stroik disregards the Court's instruction in Graham that we determine objectively the reasonableness of a police officer's use of force, "without regard to their underlying intent or motivation." Graham, 109 S.Ct. at 1872.

Conclusion

We therefore conclude that the magistrate judge erred in denying Ponseti's motion for judgment as a matter of law. Accordingly, the judgment below is

REVERSED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3591

MONICA STROIK

Plaintiff-Appellee,

versus

WILBUR PONSETI and
WARREN G. WOODFORK

Defendants,

WILBUR PONSETI

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING

(October 27, 1994)

Before GARWOOD and BARKSDALE, Circuit Judges and SHAW,* District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

CLERK'S NOTE: SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

* Chief Judge of the Western District of Louisiana, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MONICA STROIK	CIVIL ACTION
versus	NUMBER 90-4161
WILBUR PONSETI	SECTION "L" (4)

JUDGMENT

This matter came on for trial on Monday, May 4, 1992 before Magistrate Judge Ronald A. Fonseca.

The Court, having previously granted the motion of defendant, Warren G. Woodfork, for judgment as a matter of law, and;

Considering the answers of the jury to the interrogatories propounded by the Court at trial of this matter; and further considering the direction of the Court as to entry of judgment, accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Monica Stroik, plaintiff, and against Wilbur Ponseti, defendant, in the amount of $600,000.00, together with legal interest from date of judgment and costs.

DATE OF ENTRY MAY 8, 1992

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1 In view of the large award for intangible losses and the amount for future medical expenses, the Court declines in its discretion to award prejudgment interest. See Hale v. Fish, 899 F.2d 390, 404 (5th Cir. 1990).